

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

HERBERT L. BENDOLPH,	)	
	)	
Petitioner,	)	
	)	
v.	)	Criminal Action No. 95-68-SLR
	)	Civil Action No. 98-601-SLR
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

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Herbert L. Bendolph, petitioner, pro se.

Carl Schnee, United States Attorney; Richard G. Andrews, First Assistant United States Attorney, United States Attorney's Office, Wilmington, Delaware. Attorneys for respondent.

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**MEMORANDUM OPINION**

Dated: January 2, 2001  
Wilmington, Delaware

**ROBINSON, Chief Judge**

**I. INTRODUCTION**

Petitioner Herbert L. Bendolph is an inmate at the Marianna Federal Correctional Institution in Marianna, Florida. (D.I. 78) Currently before the court is petitioner's application for habeas corpus relief filed pursuant to 28 U.S.C. § 2255. Because petitioner's application was not timely filed, the court shall dismiss it without reaching its merits.

**II. BACKGROUND**

On January 31, 1996, petitioner was convicted in federal court of one count of possession of a firearm by a felon. (D.I. 41) In October 1996, petitioner was sentenced to 235 months imprisonment. (D.I. 54) On May 2, 1997, the Third Circuit affirmed petitioner's conviction.<sup>1</sup> (D.I. 63) Defendant filed a petition for certiorari on August 28, 1997, which was denied by the United States Supreme Court on October 20, 1997. (D.I. 64; Bendolph v. United States, 522 U.S. 939 (1997)) Petitioner's instant motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 is dated October 18, 1998. (D.I. 65)

**III. DISCUSSION**

On April 24, 1996, the President signed into law the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub. L.

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<sup>1</sup>The court's August 22, 2000 order (D.I. 84) listing the date of affirmance as May 5, 1997 is incorrect.

No. 104-132, 110 Stat. 1214 (1996).<sup>2</sup> AEDPA amended 28 U.S.C. § 2255 to impose a one-year statute of limitations on the filing of a § 2255 motion by a federal prisoner. See 28 U.S.C. § 2255; Miller v. New Jersey State Dep't of Corrs., 145 F.3d 616, 619 n.1 (3d Cir. 1998) (holding that one-year limitations period set forth in § 2255 is statute of limitations subject to equitable tolling, not jurisdictional bar). The one-year limitations period begins to run from the latest of:

- (1) the date on which the judgment of conviction becomes final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
- (3) the date on which the [constitutional] right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Id.

Applying these standards to the case at bar, the statute of limitations with respect to petitioner began to run on July 31, 1997, the date on which petitioner's time for filing a timely

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<sup>2</sup>Since petitioner's sentence was entered on October 2, 1996 and he filed his § 2255 motion in October 1998, AEDPA applies to petitioner without any retroactivity problem. See Lindh v. Murphy, 521 U.S. 320, 326-27 (1997).

petition for certiorari review expired. See U.S. Supr. Ct. R. 13; Kapral v. United States, 166 F.3d 565, 575, 577 (3d Cir. 1999) (holding that judgment becomes "final" in context of § 2254 and § 2255 "on the later of (1) the date on which the Supreme Court affirms the conviction and sentence on the merits or denies the defendant's timely filed petition for certiorari, or (2) the date on which the defendant's time for filing a timely petition for certiorari review expires"). Petitioner, therefore, had until July 30, 1998 to file his application for habeas relief. Since petitioner filed his habeas petition on October 18, 1998,<sup>3</sup> the court concludes that his application is untimely.

Petitioner argues that since his certiorari petition was denied on October 20, 1997, he had one year from that date to file his habeas application. However, the statute of limitations runs from the denial of a **timely-filed** petition for certiorari, not a late one. See Kapral, 166 F.3d at 569. In this case, petitioner filed a petition for certiorari on August 28, 1997, after the ninety-day deadline of July 31, 1997. Thus, petitioner's statute of limitations began to run from the date his time for filing a certiorari petition expired.

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<sup>3</sup>Courts in this district have treated the date the petition was signed (in the absence of proof of mailing) as the relevant date for purposes of calculating compliance with the limitations period. See, e.g., Murphy v. Snyder, Civ. A. No. 98-415-JJF, at 4 (D. Del. Mar. 8, 1999).

Furthermore, any mistake or miscalculation by petitioner's counsel regarding the applicable statute of limitations does not warrant equitable tolling. See, e.g., Steed v. Head, 219 F.3d 1298, 1300 (11th Cir. 2000) (holding that attorney's miscalculation based on "interpretation of novel legal issue" of habeas limitations period is not basis for equitable tolling); Kreutzer v. Bowersox, 231 F.3d 460, 463 (8th Cir. 2000) (holding that counsel's confusion about applicable statute of limitations does not warrant equitable tolling for filing habeas petition); Harris v. Hutchinson, 209 F.3d 325, 330-31 (4th Cir. 2000) (same); Taliani v. Chrans, 189 F.3d 597, 598 (7th Cir. 1999) (same).<sup>4</sup>

#### **IV. CONCLUSION**

For the aforementioned reasons, the court shall deny petitioner's applications for habeas corpus relief. An appropriate order shall issue.

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<sup>4</sup>Petitioner also contends that he filed his petition for certiorari prior to May 3, 1999, the effective date of Supreme Court Rule 13.2, which requires the Supreme Court Clerk to refuse to file untimely petitions. If Rule 13.2 had been in effect in 1997, petitioner argues, the Supreme Court Clerk would have refused to file his petition for certiorari, thereby notifying him (and his attorney) that his petition was untimely. This argument is unpersuasive since it does not excuse the fact that his petition for certiorari was untimely under the rules.

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**O R D E R**

At Wilmington, this 2nd day of January, 2001, consistent with the memorandum opinion issued this same day,

IT IS ORDERED that:

1. Petitioner Herbert L. Bendolph's above captioned application for habeas corpus relief (D.I. 65) filed pursuant to 28 U.S.C. § 2255 is dismissed and the writ denied.

2. For the reasons stated above, petitioner has failed to make a "substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), and a certificate of appealability is not warranted. See United States v. Eyer, 113 F.3d 470 (3d Cir. 1997); 3d Cir. Local Appellate Rule 22.2 (1998).

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United States District Judge